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In The

Supreme Court of the United States

October Term, 1970

No. 755

PLASCO G. MOORE,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
I. OPINION BELOW	1
II. STATEMENT OF JURISDICTION	1
III. QUESTIONS PRESENTED	1
IV. STATUTE INVOLVED	2
V. STATEMENT OF THE CASE	3
VI. ARGUMENT	5
VII. OPINION, ORDER AND JUDGMENT BELOW	9
VIII. CONCLUSION	9

APPENDIX

Opinion of the Court of Appeals
Judgment of the Court of Appeals
Order on Rehearing of the Court of Appeals

TABLE OF AUTHORITIES

CASES:

Berra v. United States,
221 F. 2d 590, aff'd, 351 U.S. 131,
76 S. Ct. 685, 100 L. Ed. 1013 (1956) 8

H. Hackfeld & Co. v. United States,
197 U.S. 442, 25 S. Ct. 456, 49 L. Ed. 826 (1905) 6,7

Hancey v. United States,
10 Cir. (1940), 108 F. 2d 835 7

Morissette v. United States,
342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952) 8

Raimond v. The Parish of Terrebonne, ... 6
132 U.S. 192, 10 S. Ct. 57, 33 L. Ed. 309 (1889) 6

United States v. Janssen,
7 Cir. (1969), 339 F. 2d 916 8

United States v. Moore,
5 Cir. (1970), 427 F. 2d 38 3

Wilson v. Merchants Loan & Trust Co.,
183 U.S. 121, 22 S. Ct. 55, 46 L. Ed. 113 (1901) 6

STATUTES: **Page**

18 U. S. C. Section 664 1,2,3,5,7,8
18 U. S. C. Section 3231 1,5
28 U. S. C. Section 1254 (1) 1

Texas Statutes:

Article 3.50, Insurance Code 3

RULES: **Page**

Federal Rules of Criminal Procedure:

Rule 23c 6
Rule 26 6

In The

Supreme Court of the United States

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No.

PLASCO G. MOORE,

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vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Plasco G. Moore, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 28, 1970.

I. OPINION BELOW

The District Court for the Northern District of Texas, Dallas Division, did not render an opinion in connection with its judgment. The opinion of the Court of Appeals for the Fifth Circuit is reported at 427 F. 2d 38, and a copy thereof is appended hereto.

II. STATEMENT OF JURISDICTION

The following is a statement of the grounds on which jurisdiction is invoked:

A. Review is sought of a judgment of the Court of Appeals for the Fifth Circuit in Cause No. 28, 765 in such court, entitled United States of America v. Plasco G. Moore, which case was an appeal from the District Court for the Northern District of Texas. The judgment of the Court of Appeals was dated and entered on May 28, 1970.

B. Petition for rehearing in the Court of Appeals was denied by order entered on August 6, 1970. By order of this court dated August 31, 1970, extension of time was granted within which to petition for certiorari, such order extending the time for filing to and including September 25, 1970.

C. The statute conferring jurisdiction for review by writ of certiorari is 28 U.S.C. Section 1254 (1). The basis for federal jurisdiction in the court of first instance was 18 U.S.C. Section 3231 and 18 U.S.C. Section 664.

III. QUESTIONS PRESENTED

Petitioner was indicted and convicted on ten counts charging willful embezzlement and conversion to his own use and to the use of another of money belonging to an employee

welfare benefit plan in violation of 18 U.S.C. Section 664. Trial was before the court, and the evidence consisted solely of a stipulation filed in the case and entered into on September 29, 1969 by and between petitioner and his counsel and the United States Attorney and approved by the court. The district court entered judgment of conviction thereon, and the Court of Appeals affirmed. The Court of Appeals held that the stipulation amply contained every essential element of the crime, including the element of intent, but left a doubt as to whether intent is an element of this crime. The questions presented are:

A. Whether the elements of the offense charged include the classic and usual elements of the crime of embezzlement and conversion.

B. Whether stipulations must, and whether these stipulations did, establish beyond a reasonable doubt each and every ultimate fact or essential element of the crime of embezzling and converting money belonging to an employee welfare benefit plan in violation of 18 U.S.C. Section 664.

IV. STATUTE INVOLVED

The federal statute involved is 18 U.S.C. Section 664, which reads as follows:

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

"As used in this section, the term 'any employee welfare benefit plan or employee pension benefit plan' means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act."

V. STATEMENT OF THE CASE

Petitioner, Plasco G. Moore, a man of humble origins whose life history is a story of self-improvement, became the principal executive of a trade association in the State of Texas. While he was so employed, the events of this case occurred. Thereafter, he was indicted and convicted of ten counts of embezzlement in violation of 18 U.S.C. Section 664. Trial was before the court on stipulated facts. Conviction was affirmed by the Court of Appeals, United States v. Moore, 5 Cir. (1970), 427 F. 2d 38. Petitioner's plea to this court rests on fundamentals: reasonable doubt; the function and effect of stipulations in a criminal case; intent; substantial evidence; the elements of the crime of embezzlement.

Petitioner was the executive vice president of the Retail Furniture Association of Texas, Inc. (herein RFAT). Under Texas law, such a trade association can provide group insurance for its members and their employees only through the vehicle of a trust. Art. 3.50, Texas Insurance Code, Vernon's Annotated Civil Statutes. RFAT created the Retail Furniture Association of Texas, Inc. Insurance Fund (herein RFAT Insurance Account), an express trust under Texas law. The RFAT Insurance Account's primary purpose was to provide group insurance for RFAT members and their employees. RFAT retained complete control of the RFAT Insurance Account through the absolute power to remove and replace trustees.

The RFAT Insurance Account "loaded" an additional charge to the participants in the insurance program above and beyond the amount required by the insurance company as

premiums. This was a customary practice in the industry. Amounts so "loaded" did not belong to any individual insured or participant in this program. The RFAT Insurance Account transferred $1,000 per month to the RFAT general account from such overload to pay administrative expenses. Overload sums remaining thereafter were transferred from time to time by the RFAT Insurance Account to the RFAT general account. The total overload during the period in question was $64,347.72, some of which was spent by RFAT for such items as club and liquor bills and building improvements and administrative expense, and the balance of which – $7,800 – was alleged to have been embezzled by petitioner.

The record reflects, and indeed the indictment charges, that petitioner took an aggregate of $7,800 for his own use *and for the use of his employer, RFAT.* He spent the money on club and liquor bills which were the result of RFAT legislative activities. Yet this man stands convicted of stealing. Further analysis of the facts renders the conviction of embezzlement even more incredulous.

Through absolute control and through actual practice, the RFAT Insurance Account was the creature of and the alter ego of RFAT. Although petitioner's actions were not specifically authorized by the trustees of the RFAT Insurance Account, the fact remains that he was operating in a context of repeated and continuous authorized overlapping and co-mingling of accounts and funds.

The facts shown by the stipulations are substantially the same regarding each count on which petitioner was convicted. Without authority from the RFAT Insurance Account trustees, petitioner caused the RFAT Insurance Account to make periodic overpayments of group insurance premiums to the insurance carriers. After receipt of the premiums and audit of the amounts due, the insurance carriers independently ordered a

refund of the amount of such overpayments. *These refunds were made by checks payable not to the RFAT Insurance Account, but to RFAT.* Petitioner took such checks and applied them to various club and hotel bills incurred by him on his RFAT duties. This accounted for $4,917.82 of said $7,800, with $2,882.18 overage in cash delivered to petitioner and not being accounted for by the stipulations.

Finally, petitioner would show that the basis for federal jurisdiction in the court of first instance was 18 U.S.C. Sections 664 and 3231.

VI. ARGUMENT: Reasons Relied on for Allowance of the Writ

This case is hornbook law. It is founded on one petitioner's simple belief that this court – which sits to determine legal questions of national import – will insist that basic and elemental legal precepts be observed by the federal courts, even in a case which is, of course, significant to this one petitioner. The broader significance is, however, that the first reported construction of 18 U. S. C. Section 664 (herein Section 664) is erroneous, and such error will be compounded if the decision of the Court of Appeals is allowed to stand as precedent. The court should also clarify the proper role and scope of stipulations in criminal cases.

On the question of the elements of the crime of embezzlement, the Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter, and as applied to Section 664, the rationale of the Court of Appeals conflicts with prior decisions of this court. Also, petitioner would show that this important federal statute and the law questions arising thereunder have not been, but should be, settled by this court.

A. Function and Scope of Stipulations.

Although the use of stipulations or agreed facts is a fairly common practice in civil actions, it can also occur in a criminal

case. See, e.g., H. Hackfeld & Co. v. United States, 197 U.S. 442, 25 S. Ct. 456, 49 L. Ed. 826 (1905).

An early case held that "a statement of facts by the parties . . . is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts, or from which they may be inferred." Raimond v. The Parish of Terrebonne, 132 U.S. 192, 10 S. Ct. 57, 33 L. Ed. 309 (1889). Where there is an element of a cause of action, such as consent, it is not enough that consent can be inferred from the stipulations; there must be a specific finding of this ultimate fact. Wilson v. Merchants Loan & Trust Co., 183 U.S. 121, 22 S. Ct. 55, 46 L. Ed. 113 (1901). *Hackfeld*, supra, also embraced the ultimate fact doctrine (and found that the ultimate facts were present in the stipulations there considered).

Thus the stipulations should take on the character of a special verdict or of findings pursuant to Rule 23(c), Federal Rules of Criminal Procedure. Presumably such stipulations are admissible as documentary evidence or common law exception to the oral testimony requirement of Rule 26, Federal Rules of Criminal Procedure. In any event, as mentioned in *Hackfeld*, supra, it must be assumed that each party makes the stipulation in good faith.

Obviously, if the stipulations constitute all of the evidence, then such stipulations must – at the trial court level – establish beyond a reasonable doubt the guilt of the accused. The Court of Appeals seems to confuse this standard with the standard applied on appellate review of analyzing the evidence in the light most favorable to the government. 427 F. 2d at 41, 42.

This court should reaffirm the *Hackfeld* doctrine and blend it with the trial court standard of proof beyond a reasonable doubt.

B. Essential Elements of Section 664.

With only factual differences each count of the indictment is the same. Count 1 reads as follows:

> "On or about January 3, 1965, in the Dallas Division of the Northern District of Texas, PLASCO G. MOORE, defendant, unlawfully, wilfully and knowingly, did embezzle and convert to his own use and to the use of another, that is, Retail Furniture Association of Texas, Inc., the sum of $400 of the money belonging to the Trustees Insurance Fund, Retail Furniture Association of Texas, Inc., Dallas, Texas, an employee welfare benefit plan established and maintained by the Retail Furniture Association of Texas, Inc., which was then an employer engaged in an industry and activity affecting commerce within the purview of the Welfare Pension Plans Disclosure Act, as amended (Chapter 10, Title 29, U.S.C.), which said money had come into the possession and under the care of PLASCO G. MOORE by virtue of his position as Executive Vice President of the Retail Furniture Association of Texas, Inc., with the duty of supervising such plan.
>
> "A violation of Title 18, United States Code, Section 664."

This brings to mind the usual definition of the elements of embezzlement, which are stated in Hancey v. United States, 10 Cir. (1940), 108 F. 2d 835, as being: (1) property of another in rightful possession of the accused; (2) fraudulent intent to deprive the owner thereof; (3) unlawful appropriation of such property by the accused.

The Court of Appeals indicates that Section 664 and this indictment do not necessarily call for proof of intent or specific intent. 427 F. 2d at 42. In a case involving a statute quite similar to Section 664, this court traced the history of intent in our criminal jurisprudence and reached a result contrary to the pronouncements of the Court of Appeals. Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952). There should be no doubt that Section 664 requires specific intent as one of its elements, and this court should so decide.

Several Court of Appeals cases analyze the elements of embezzlement in fact situations somewhat similar to that presented here. In Berra v. United States, 221 F. 2d 590, aff'd, 351 U.S. 131, 76 S. Ct. 685, 100 L. Ed. 1013 (1956), the accused attempted to plead embezzlement as a then valid defense to income tax evasion. He had paid padded bills from his employer's funds and would personally receive an overpayment refund. The court held that the accused may have been guilty of obtaining the money of a welfare organization by a fraudulent scheme or device but not by embezzlement. 221 F. 2d at 594.

United States v. Jannsen, 7 Cir. (1969), 339 F. 2d 916, also involved an "embezzlement defense" to income tax evasion. Jannsen received a secret kickback from his employer's contractor which was held not to be embezzlement because the funds came into his possession unlawfully through the secret arrangement. 339 F. 2d at 918, 919.

C. Failure of Evidence to Convict Petitioner.

Under the requirement that the stipulations prove ultimate facts beyond a reasonable doubt, the evidence in the instant case falls short in that there is no specific finding of intent.

A further failure of the stipulations is that they do not establish that petitioner wrongfully took money which was the property of the RFAT Insurance Account. Title to such money lawfully passed to the insurance carriers. There was no evidence of collusion or connivance on the part of the insurance carriers. Their refund checks passed moneys or funds to RFAT, not to the RFAT Insurance Account. Thus, if there was a misapplication of funds, it occurred with regard to RFAT's funds, and petitioner was not charged or convicted of embezzling RFAT's funds.

VII. OPINION, ORDER AND JUDGMENT BELOW

Appended hereto is a copy of:

A. Opinion of the Court of Appeals.

B. Judgment of the Court of Appeals.

C. Order on Rehearing of the Court of Appeals.

VIII. CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,
v.
Plasco G. MOORE, Defendant-Appellant.
No. 28765
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

May 28, 1970.

Rehearing Denied August 6, 1970.

Before THORNBERRY, CLARK and INGRAHAM, Circuit Judges.

CLARK, Circuit Judge.

[1] On stipulated facts in a trial before the court without a jury, Plasco G. Moore was convicted on each of 10 counts charging wilful embezzlement and conversion of funds of an employee pension benefit plan to his own use and to the use of the Retail Furniture Association of Texas, Inc. (RFAT). His contentions that the stipulation failed to prove the elements of the crime, particularly a wilful or knowing criminal act, and that the district court erred in considering the defendant's consciousness of guilt in connection with his sentencing, are not well taken. We affirm.[1]

Defendant was the Executive Secretary of RFAT, a Texas corporation, which had established an employee-welfare benefit

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1. Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See Murphy v. Houma Well Service, 409 F.2d 804 (5th Cir. 1969), Part I; and Huth v. Southern Pacific Company, 417 F.2d 526 (5th Cir. 1969), Part I.

plan which was subject to the provisions of the Welfare and Pension Plans Disclosure Act.[2] The benefit plan was in the form of an insurance trust which was charged with the duty of providing group, life, accident and hospital insurance for the owners, partners and employees of member firms of RFAT. On the ten separate occasions which formed the basis for the separate counts against him, defendant, without authorization of the trustees of the insurance trust fund, instructed an employee under his control who had charge of paying monthly premiums from the insurance fund account, to pay more than was then due to the insurance company carrying the coverage for the trust. As a consequence of this deliberate overpayment the insurance company carrying the coverage issued its check refunding the excess amount. These checks were payable directly to RFAT rather than the insurance trust. The drafts covering these repayments showed on their face either "Refund of unearned premium" or "Refund of premium overpaid." Defendant negotiated each of these checks and applied these refunded excess funds to reduce account balances carried in his personal name at the 21 Turtle Club, Kings Club, Adolphus Hotel and Sigel Liquor Store in Dallas, Texas, and the Continental Houston Hotel in Houston, Texas. In addition to credits on these accounts, a total cash sum in excess of $3,282.18 was obtained by defendant through this same procedure. No part of the refunds was returned to the insurance fund.

Even larger amounts than were represented by these repayments of deliberate overpayments were paid over to RFAT by the trustees of the insurance fund for the purpose of defraying the expenses of operating and servicing the insurance program, a function which was handled by RFAT for the insurance trust. Only part of these payments was needed to

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2. 29 U.S.C. Section 301 et. seq. (1965)

meet the expense of operating and servicing the insurance service. The other part of these funds was used by RFAT to pay similar club and whiskey store accounts and to provide defendant with cash funds.

In connection with his sentencing, defendant advised the court that all "refund" funds he was charged to have embezzled or converted were used in carrying on the legislative lobbying activities of RFAT. He further stated that all payments of insurance fund monies made to RFAT, whether received from the insurance companies in the form of refunds or received directly from the trustees for the purpose of defraying expenses, were payments which were not needed to meet insurance premium costs and were funds which after payment of actual operating and servicing expenses, would have eventually become the property of RFAT anyway and would have been used to defray these same lobbying expenses.

All counts of the entitlement against defendant charged violations of 18 U.S.C.A. Section 664 (1966), which provides in pertinent part:

> "Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use or to the use of another, any of the monies, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both."

The defendant's conviction on all ten counts resulted in concurrent sentences of 13 months on each count.

At the sentencing proceedings, held one week after the court's determination of guilt, defendant made a lengthy

statement concerning his past life which he described as industrious, productive and free of any significant criminal activity. At this point the following exchange occurred between the defendant and the district judge:

"THE DEFENDANT MOORE:

* * * In relation to the case here today, I did not do a single dishonest act. The use of the funds for the Association, as they were used, I did not think was illegal. Certainly none of it accrued to me personally. (30). It was the responsibility of somebody to transfer funds, Your Honor, from that in the temporary custody of a Trustees' insurance bank account to the Association.

THE COURT:

You must have known that the funds were not to be used for the purpose for which you spent them? Most of the funds were used to pay club bills?

THE DEFENDANT MOORE:

Yes.

THE COURT:

Those bills had been incurred by reason of your lobbying, and certainly you did not do anything for the fund in connection with the money that was expended.

THE DEFENDANT MOORE:

Yes, Your Honor. Some $64,000 during this period was transferred, and much of that was used to pay off things as club bills.

The Board of Directors, Your Honor, made such transfer without seeking authority from the Insurance Board of Trustees.

THE COURT:

I would like it much better if you would take some blame in this matter instead of saying that you did nothing wrong.

THE DEFENDANT MOORE:

Well, may I change the phrase then to – I did not think I did anything illegal, Your Honor.

THE COURT:

Did you think you did something wrong?

(31) THE DEFENDANT MOORE:

I think it's wrong when you do not follow correct bookkeeping procedures.

THE COURT:

And when you spend money for purposes for which it wasn't intended?

THE DEFENDANT MOORE:

Well, the money which would eventually have been transferred to the Association, I mean, could have been for any purpose, once it got into the general account."

After additional remarks from the defendant and his counsel, the court stated:

"Mr. Moore, will you stand up, please.

You have had many admirable things in connection (34) with your life and beginning with the time when you were a child. You made a lot of yourself against many difficulties -- in the face of many difficulties, so I admire you for those.

The thing, though, that concerns me is that you see nothing wrong with what you have done. Disregarding the fact that it was a violation of a Federal law, you pass that by. I still think that you should realize that to spend money for the purpose for which you spent it, quite contrary to the purposes of the fund, that you were doing something wrong, whether you considered it illegal or not, and the fact that you do not think you did anything wrong really concerns me more than anything else.

Now, an offense such as this in my opinion, the purpose of sentencing is not only to rehabilitate, and to punish. I think you've been punished. I doubt that you need rehabilitation, though I think you should have some time to consider whether what you did was morally wrong, but the purpose of sentencing in a case like this is to deter others who have in their hands money that belongs to somebody else and use it for their own purposes. So, I do feel that you should have an institutional sentence."

[2,3] This is a court of review. Its function is not to try the defendant de novo. Campbell v. United States, 291 F.2d 401 (5th Cir. 1961). We apply here the same test to determine the sufficiency of the stipulated facts as would be applied if we

were reviewing the relevant and admissible evidence upon the action of the trial court in refusing to direct a judgment of acquittal. Cf. De Luna v. United States, 228 F.2d 114 (5th Cir. 1956). That test expressed in the terms of this case, is whether the judge could accept the stipulated facts, considered in the light most favorable to the government, as adequate and sufficient to support the conclusion that the defendant was guilty beyond a reasonable doubt. Henderson v. United States, 425 F.2d 134 (5th Cir. 1970); United States v. Bearden, 423 F.2d 805 (5th Cir. 1970); United States v. Preston, 420 F.2d 60 (5th Cir. 1970).

[4] In applying this test to the case at bar we are bound to say that the facts which were stipulated were amply sufficient to enable the court as a trier of fact to find the defendant guilty of every essential element of the crime defined by statute. The insurance fund was a separate entity from RFAT and was expressly stipulated to be a plan covered by the Welfare and Pension Plans Disclosure Act. The stipulation established that funds belonging to the plan were knowingly and intentionally, not inadvertently or mistakenly, diverted through a transparent ruse from the account of the plan to the account of the defendant.

There is no need for this court to wrestle with the difficult question of whether this statute, as a part of an over-all scheme of remedial legislation, requires proof of an evil or criminal intent or whether it merely requires a showing of facts which violate the provisions of the statute.[3] The law assumes every man to intend the natural consequences of his rational acts. Moorman v. United States, 389 F.2d 27 (5th Cir. 1968). It was

3. See Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), interpreting a very similar statute, 18 U.S.C.A. Section 641; McBride v. United States, 225 F.2d 249 (5th Cir. 1955); and Roe v. United States, 287 F.2d 435 (5th Cir. 1961).

for the trier of fact to conclude whether the mental element of a wrongful purpose was disclosed by the stipulated facts. Whether we apply the strict or more relaxed legal standard to the requirements of the statute below is immaterial to the outcome of this appeal. If the statute required no criminal intent the facts set out in the stipulation in and of themselves proved defendant guilty. If *mens rea* was legally required the evidence was more than sufficient to warrant the court in concluding that such an intent was present, and thus under the legal test we are to apply in this court, the trial court's determination of guilt may not be disturbed.

[5–7] The defendant's objection to the colloquy between himself and the court at the time of sentencing raises the issue of this court's function in reviewing or supervising district court sentencing procedures: Normally, sentences to be assessed, so long as they are within the statutory limits, are committed to the sound discretion of the trial judge and will not be disturbed on appeal in the absence of a clear abuse of that discretion. *See, e. g.*, Castle v. United States, 399 F.2d 642 (5th Cir. 1968).

Here the ten counts on which defendant was convicted could have resulted in consecutive sentences totaling 50 years plus fines totaling 100,000 dollars. Against this possible penalty the court's imposition of 13-month concurrent sentences are, to say the least, mild. Certainly the length of the sentence does not demonstrate any pique or personal animosity on the part of the trial judge. Rather, the sentencing proceedings read as a whole indicate that the court was motivated only by a proper concern for the due administration of justice. Since the sentence imposed was a mere fraction of that authorized, we view this case differently from the case before this court in Thomas v. United States, 368 F.2d 941 (5th Cir. 1966); which called into play this court's supervisory power over sentencing procedures. *See* also Scott v. United States, 419 F.2d 264 (D.C.Cir. 1969);

contra, Williams v. United States, 273 F.2d 469 (10th Cir. 1959).

Regardless of the trial court's motivation, such exchanges between the court and a defendant are fraught with the latent dangers which were pointed out in *Thomas*. For all of the reasons pointed out in that opinion, such remarks or requests to a defendant during sentencing should be avoided. However, if the trial court did in fact penalize defendant in any way for his refusal to confess guilt at sentencing, we know that court will act to correct the sentence imposed under the provisions of Rule 35, Fed.R. Crim.P. We deem it neither necessary nor appropriate to exercise this court's supervisory power in this case.

Affirmed.

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 28765

DC Docket CR-3-1562

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PLASCO G. MOORE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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Before THORNBERRY, CLARK and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

May 28, 1970

Issued as Mandate:

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 28765

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PLASCO G. MOORE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

Before THORNBERRY, CLARK and INGRAHAM, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is hereby, denied.

(Original filed - August 6, 1970)

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 755

PLASCO G. MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial on stipulated facts in the United States District Court for the Northern District of Texas, petitioner was convicted on ten counts charging the embezzlement, stealing, or unlawful and wilful conversion of moneys belonging to an employee welfare benefit plan, in violation of 18 U.S.C. 664. He was sentenced to concurrent prison terms of thirteen months. The court of appeals affirmed (Pet. App.; 427 F.2d 38).

Petitioner contends that Section 664 requires proof of evil intent (as opposed to mere deliberate misappropriation of funds) and that the stipulation therefore failed to establish the elements of the offense.[1] As held by the court below, which fully analyzed the evidence, whether or not evil intent was an element of the crime, the stipulated facts were "amply sufficient" for conviction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1970.

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[1] Petitioner also argues (Pet. 10) that the stipulation did not show that the embezzled funds were the property of the insurance trust fund rather than the parent company. The stipulation showed that the trustees of the fund had given petitioner, as plan supervisor, authority to calculate the amount of the premium due the insurance carrier as well as authorizing automatic payment of $1,000 per month to pay costs incurred by the company in connection with administering the plan. This authority did not include authority for petitioner to reimburse the company for administrative expenses not covered by the automatic monthly payments. Such authorization had to come from the trustees. Until that time, the sums petitioner received from the insurance carrier in the form of checks payable to the company belonged to the insurance trust fund, just as would a dividend paid by the carrier. See 29 C.F.R. 464.6(b)(2) and 464.7(b)(7).

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